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The Legal Ethics of the Two Kingdoms

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The Inaugural Seegers Lecture:
THE LEGAL ETHICS OF THE TWO KINGDOMS
Thomas L. Shaffer

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Thomas L. Shaffer is currently a Professor of Law at Washington and Lee University. Prior to teaching at Washington and Lee, Professor Shaffer spent the majority of his time at the University of Notre Dame Law School, serving as Professor of Law (1966-80), Associate Dean (1969-70), and Dean of the Law School (1971-75). Shaffer also spent time at UCLA (1970-71) and University of Virginia (1975-76) as a Visiting Professor. Professor Shaffer received his B.A. in 1958 from the University of Albuquerque, and his J.D. from the University of Notre Dame in 1961.

During his career, Professor Shaffer has published several articles and books. Although many of his publications focus on ethical issues, Professor Shaffer has written on several topics. Brigham Young University Press published his most recent book, *ON BEING A CHRISTIAN AND A LAWYER* (1981). Other publications include: *THE PLANNING AND DRAFTING OF WILLS AND TRUSTS* (Foundation Press 2d ed. 1979), *LEGAL INTERVIEWING AND COUNSELING* (West Publishing Co. 1976), "*Lawyer, Counselors, Counselors at Law*," 61 *AMERICAN BAR ASSOC. JOURNAL* 854 (1975), and *DEATH, PROPERTY AND LAWYERS* (Dunellen 1970).

THE LEGAL ETHICS OF THE TWO KINGDOMS

Thomas L. Shaffer*

I. THE QUESTION OF A SEPARATE MORALITY

Before I ask the question it is relevant to ask why the question is appropriate. I rely here, in tribute to Mr. Edward A. Seegers of the Chicago Bar, the donor of this series, on an undertaking of this school and of its University, an undertaking reviewed by my old friend, Professor Louis F. Bartelt, Jr., when he acted as your historian a couple of years ago:¹

"Valparaiso University's tradition tells us that Oliver Wendell Holmes' admonition to teach law in the grand manner and make great lawyers—the path to a distinguished law school—is not enough for us. We must strive for this, of course. But to fulfil the destiny of the University, we must also cherish the consonance of the study of law and theology—and the consonance of that freedom which is under the law and that freedom and responsibility found in the Gospel of Jesus Christ."

The question I propose to address while I am with you is this: Is there a special morality for professional life? In terms of convention and argot, the answer to that question would appear to be: Yes, there is a separate morality for the professional lives of lawyers and judges. We do not follow the same morals in public and professional life as we follow in personal life:

(1) The earliest statements of rules of behavior for American lawyers made no distinction between personal and professional life.² These were admonitions by law teachers, though; they were not the work of bar associations or committees of practicing lawyers. When, in the age of the robber barons and their lawyers, the profession began to put its ethics into codes,³ there appeared a distinction between etiquette and regulation on the one hand and morals on the other.⁴ Each

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1. L. Bartelt, Jr., *The First Century of the School of Law at Valparaiso University*, THE CRESSET, Oct. 1979, 16, 21.

2. II D. HOFFMAN, A COURSE OF LEGAL STUDY 720 (2nd ed. 1836); G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (1854) (4th ed. 1876); see Schaffer, *Negotiation Ethics: A Report to Cartaphila*, LITIGATION, Winter 1981, 37.

3. Schudson, *Public, Private and Professional Lives: The Correspondence of David Dudley Field and Samuel Bowles*, 21 AM. J. LEGAL HIST. 191 (1977).

4. E.g., *Code of Ethics Adopted by Alabama State Bar Association*, 118 Alabama

generation of American lawyers since then has revised its code of ethics; and each revision says less about morals, and says what it does say about morals less precisely.⁵ The most recent American Bar Association proposals bring this development to a new fullness by avoiding the old words of ethical argument—words such as conscience, morality, right, good, and propriety—in favor of the words of mandate and permission that are the stuff of statutes and court orders.⁶ The claim implicit in these proposals is that the nationally organized bar is no longer able to provide moral admonition to the profession; moral admonition has become either entirely private or a concern appropriate in more local or more specialized organizations.⁷ Other contemporary comment on the morals of lawyers suggests that lawyers should keep their personal morals out of their law practices. Our lives are described by the cartoon in *The New Yorker* that shows two judges robing for their day's work; one says to the other, "This daily metamorphosis never fails to amaze me. Around the house, I'm a perfect idiot. I come to court, put on a black robe, and . . . I'm it."

(2) A common professional and political view is that a lawyer may do for his client, or an official for his country, what would be immoral if either acted in the same way for himself. Professor John T. Noonan, Jr., of the University of California⁸ gives as an example the Wall Street lawyer who bribed a federal judge, escaped prosecution, and gained or retained the esteem of his law firm and of the Bar. The published history of that lawyer's law firm says of him, "No lawyer ever unreservedly gave more of himself for a client." Professor Noonan also mentions Sir Winston Churchill's order to bomb Dresden in World War II, an act that incinerated thousands of civilian refugees in revenge for the bombing of Britain. Sir Winston acted for his countrymen, not for himself. If his conscience gave him pause, he kept his conscience to himself. Last summer, the comics provided a more candid example: Mark Trial, outdoorsman and righter of wrongs, went

xxiii (1899), the first American code, drafted in the late 1880s by Judge Thomas Good Jones; see Armstrong, *infra* note 5.

5. A.B.A., CANONS OF PROFESSIONAL ETHICS CODE OF PROFESSIONAL RESPONSIBILITY (1969); Armstrong, *A Century of Legal Ethics*, 64 A.B.A.J. 1063 (1978); see Jones, *Lawyers and Justice: The Uneasy Ethics of Partisanship*, 23 VILL. L. REV. 957 (1978).

6. A.B.A., COMM'N ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT, PROPOSED FINAL DRAFT (1981), and the same Commission's ALTERNATIVE DRAFT (1981).

7. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RESEARCH J. 953.

8. Noonan, *Other People's Morals: The Lawyer's Conscience*, 48 TENN. L. REV. 227 (1981).

mountain climbing with a government agent. They were searching in the high timber for a highjacker who had bailed out of an airplane with a million dollars. They split up. Mark found the body of the highjacker, but no money. Mark called to the agent, who joined him and the body and suggested that Mark had found the money and hidden it. Mark, who is a person of formidable integrity, objected to this; the agent said, "I'm just doing my job, Mark."⁹

(3) When political questions in our country are tense, we make continued deliberation of them possible by making morals private. Abortion is the most prominent example at the moment, but the same protocol was followed in the 1840's and 1850's when slavery was a tense issue; even Senator Barry Goldwater has noticed an uncivil resemblance between today's pro-life groups and yesterday's abolitionists. It is impolite to claim moral reasons for opposing abortion—or, even, moral reasons for approving of abortion. And it is improper to consult one's morals in deciding how to act politically or legally on the question: When one is responsible for law or public policy on abortion, he is to keep his morals to himself. One may, for the benefit of the voters, announce his personal views, but he is expected to add that he won't *consult* these personal views when he acts officially.

Perhaps the argument is that public and professional life has no morality. If that is the argument it is not interesting ethically, since ethical discussion begins with a first principle: Do good and avoid evil.¹⁰ One who won't agree on that beginning point is not interested in ethics. It may be possible to talk with him about football, but not about morals; I'm not sure I would want to play poker with him. In the examples I have given above, though, the argument is that public and professional life has a morality, but it is a *separate* morality. The argument behind the agent's saying, "It's my job" is that it is a *good* thing to do the job—and that is a moral argument. The agent implies at least that the job should dispense him from the personal morals he would otherwise follow—and that, too, is a moral argument.¹¹ A distressing example of this moral argument, for me, came up in the country's agony over Viet Nam: The Doves said, "That war is im-

9. The Washington Post, Aug. 1, 1981, p. E-38, col. 4. Another example, J. MACDONALD, *ONE FEARFUL YELLOW EYE* 181 (1966):

"Forgive me for lying to you the last time I was here?"

"Oh yes! You've got a *job* to do."

10. W. FRANKENA, *ETHICS* 2-9 (2nd ed. 1973).

11. Peter, *Vacarious Morality and the Law*, 14 CREIGHTON L. REV. 1379 (1981); Little, *Duties of Station vs. Duties of Conscience: Are There Two Moralities?* in D. JONES (ed.), *PRIVATE AND PUBLIC ETHICS* 125 (1978).

moral." Some of the Hawks said, "All war is immoral," which seemed to mean, in that instance, that it was moral to be immoral. However, I don't think the Hawks were deciding to be evil; they were deciding, instead, that the circumstances carried a dispensation from ordinary morality. I think probably the argument went beyond that and said that our intervention with violence and death was the moral thing to do; for some of the Hawks that argument implied that international statecraft has a different morality than personal life does; in that sense, all war is immoral.¹²

The most popular American lawyer of the 1950's and 1960's would probably, and even in the face of these examples, answer my question the other way. He would probably say, "No. There is not a separate morality for professional life." He was Atticus Finch, small-town Alabama lawyer and hero of the novel and movie "To Kill a Mockingbird."¹³ It was Atticus who said, "I can't live one way in town and another way in my home." It might be useful to pause for a moment over the circumstances in which he said that.

Atticus had defended a black man accused of raping a white woman, in Maycomb, Alabama, in 1935. He lost the case. But in the course of the defense he demonstrated that the prosecuting witness and her father were liars. The extraordinary thing about the defense was that Atticus insisted, win or lose, that the truth be told. The father of the prosecuting witness resented this uncommon devotion to the truth and, toward the end of the story, he tracked the two Finch children down and tried to kill them. In the course of that attempt he—his name was Robert Ewell—was himself killed. The question in the last scene in that story was who killed Robert Ewell.

Atticus thought at first that his 12-year-old son Jem had killed Ewell. It would undoubtedly have been in defense of himself and his little sister that he did so. There would not have been any question about prosecution, but there would have been public inquiry and Jem would have been in the limelight as a killer. Which was too bad, particularly in view of the fact that Jem was at that point badly hurt

12. This is not the only possible position; *e.g.*: "[T]he Christian community . . . can never stand for absolute peace, for peace at any price. But it must and will do all it can to see that no price is considered too high for the preservation or restoration of peace at home and abroad except the ultimate price which would mean the abolition of the lawful state and the practical denial of the divine ordinance." K. BARTH, *COMMUNITY, STATE AND CHURCH* 178-179 (1968).

13. H. LEE, *TO KILL A MOCKINGBIRD* (1960); H. FOOTE, *THE SCREENPLAY OF TO KILL A MOCKINGBIRD* (1964).

and unconscious. Atticus and Sheriff Heck Tate were talking about this, in fact, over Jem's unconscious body:

The Sheriff said he would report that Ewell had fallen on his own knife. That was a lie, but, the Sheriff said, "Let the dead bury their dead." Where the truth seems unnecessary, the rules of public life do not forbid a lie, particularly when the truth will be painful. Let well enough alone. Atticus demanded, as he had in the rape trial, that the truth be told. He said his injured son could not have the benefit of a dual system of morals. "I can't live one way in town and another way in my home." There is only one system of morals for personal life and professional life. Insistence on the truth is necessary with one's son as much as with one's clients.

Atticus in this respect represented the oldest, and maybe the most prevalent, historically, of the moral ideals governing American professional and judicial life. Atticus' moral system was the "code" of the Christian gentleman.¹⁴ When young Jem began to understand how Atticus lived, and how he would live, too, he said, "Atticus is a gentleman, and so am I." A dual system of morals for a gentleman was unacceptable; it was necessary for Jem, who was in training to be a gentleman, to know that. It was necessary even that he suffer in his learning of it. A gentleman may not be able to change evil, or to overcome it, but he must learn to endure it and not to be duped by it.¹⁵ And he does this by telling the truth. This is an ethic almost any American lawyer of the period prior to 1850 would have understood. (It says something about popular discussion of morals, by the way, that the movie version of Atticus' story leaves this point out).

Chief Justice Roger Brooke Taney, after he wrote the opinion in the License Cases in the 1830's, noticed that his view as a judge differed from the position he had argued on similar questions when he was before the court as an advocate. He felt that it was necessary to say that this was not because he believed there was a different standard of judgment for an advocate than for a judge. He had, he said, changed his mind on what the relevant law ought to be.¹⁶ He implied the view that an advocate should not argue for a legal rule

14. Shaffer, *The Moral Theology of Atticus Finch*, 42 U. PITT. L. REV. 181 (1981).

15. W. FAULKNER, *THE REIVERS* 302 (1962): "A gentleman can live through anything. He faces anything. A gentleman accepts the responsibility of his actions and bears the burden of their consequences, even when he did not himself instigate them but only acquiesced to them, didn't say No though he knew he should." See Shaffer, *Christian Lawyer Stories and American Legal Ethics*, ____ MERCER L. REV. ____ (198).

16. B. STEINER, *LIFE OF ROGER BROOKE TANEY* 267-273 (1922).

he did not believe in. There was no difference in his mind between the morals of a lawyer and the morals of a judge.

That opinion was also taught to law students by the father of American legal ethics, David Hoffman, a Baltimore lawyer and law professor who was active in the 1820's and 1830's, and was a colleague of Taney's at the Maryland Bar. Hoffman said, in his influential "Resolutions on Professional Deportment," that a lawyer should not plead the statute of limitations. "If my client is conscious he owes the debt," Hoffman said, "and has no other defense than the *legal bar*, he shall never make me a partner in his knavery."¹⁷ From the point of view of these Christian gentlemen, professional and public life are governed by the same morality. The gentleman's ethic would, in fact, warn that a different point of view leads to evil, corrupting results.

Another hero to modern American lawyers is Thomas More—not so much the *Saint* Thomas More who has been the popular patron of Roman Catholic lawyers, as the existentialist Thomas More of Robert Bolt's play, "A Man for All Seasons."¹⁸ In Bolt's rendering, More is the hero who has "an adamant sense of his own self," who cannot claim a special morality for professional and public life because he cannot divide himself in two. Consider the first encounter, in the play, between Richard Rich and Thomas Cromwell. Rich is a friend of Sir Thomas More. Cromwell, then secretary to King Henry VIII, is out to stifle opposition to obtaining an annulment of King Henry's marriage. More does not—dare not—oppose the annulment in public, but Cromwell suspects that More opposes it in private. He turns to Rich to discover More's private conversations because Rich is corruptible. It turns out that Cromwell is wrong about More's private conversations, but right about Rich. More says nothing to anybody about his views on the King's marriage, but, late in the play, Rich gives false testimony against More, and is made Attorney General for Wales. You may remember the point in the play where More hears the false testimony in court. He says to Rich, "It profits a man nothing to give his soul for the whole world. . . . But for Wales!"

Earlier in the story, when Cromwell is testing Rich, he asks Rich whether he is capable of providing what the state needs, if the state needs faithlessness toward his friend and even falsehood. Rich replies that the answer depends on what he is offered. Cromwell says that he admires that answer; many men, he says, believe faithfulness is

17. D. HOFFMAN, note 2 *supra*, Res. XII.

18. R. BOLT, *A MAN FOR ALL SEASONS* (1960).

a matter of price, but few will say it. Rich objects a little. "There are *some* things one wouldn't do for anything. Surely." And Cromwell says it is all a matter of "administrative convenience. . . . Our job as administrators," he tells Rich, is to make convenient what power wants. "There *are* these men—you know—'upright,' 'steadfast,' men who want themselves to be the constant factor in the situation; which, of course, they can't be. The situation rolls forward in any case. . . . If they've any sense they get out of its way. . . . [If not,] well, they're fit only for Heaven." Heaven has one morality; the "constant factor," power in the court of a king, has another. More's argument against a separate morality is a political argument. More says: "I believe, when statesmen forsake their private conscience for the sake of their public duties . . . they lead their country by a short route to chaos."¹⁹

The Two Kingdoms

So far this comparison of those who believe that public and professional life has morals of its own, with those who believe that life in town and life at home are governed by the same morality, looks like a comparison of good guys and bad buys. In reference to Thomas More, what I have done with him and Cromwell—and what Robert Bolt did—is what the curator at the Frick Museum once did with Holbein's portraits of them: The curator put More's portrait on one side of a fireplace, Cromwell's on the other, and El Greco's St. Jerome, like Jehovah, over the fireplace and high above them both. More and Cromwell in the museum are opposites, as the men themselves were, at least in Bolt's story. They are, though, opposites under God. Cromwell talks about administrative convenience in a useful institution; More says he is the King's good servant but God's first. The argument looks more modest with St. Jerome looking down on it. I don't know if Cromwell would have enjoyed the arrangement, but I'm sure More would have.

A theory of good and evil here is too simple. The view that public and professional life has rules of its own is an ancient, even religious, even biblical point of view. It has to be taken more seriously than it was in Bolt's play and in the flippant manner in which Hollywood bowdlerized Harper Lee's novel. There is something to be said for Cromwell. At the very least, we might notice that Cromwell understood, much better than More did, what was going on in England and in the world, that he was at least willing to remain in public life,

19. See Hauerwas and Schaffer, *Thomas More's Skill and Thomas More's Hope*, in T. SHAFFER, *ON BEING A CHRISTIAN AND A LAWYER* 189-206 (1981).

unlike More, who resigned and tried to survive as a private person.²⁰ Cromwell has going for him at least the argument that he was competent in an institution that kept bloodshed at bay for England, if not for himself. He was an able public official, although he also went to the block when he was not administratively convenient to the King. His nationalistic politics were more appropriate to the times than More's attempt to preserve the medieval order.²¹

In defense of Cromwell and of the ethics of administrative convenience, consider how deep are the origins of the view that public and professional life has a separate morality. The God of the Old Testament, the God of Abraham, Isaac, and Jacob, does not, for example, appear to follow the morals of righteousness He imposes on His people Israel. He chooses Abel, rejects Cain; chooses Jacob, rejects Esau; chooses Isaac, rejects Ishmael; chooses Israel, rejects the other nations—and even requires Israel to destroy the other nations. He seems to be a God who is not governed by morals: He seems to be a God Who—to use Browning's irreverent phrase—"Doth as he likes, or wherefore Lord?"²² Consider the description of Him in Psalm 111 (New English Bible):

He showed his people what his strength could do,
bestowing on them the lands of other nations.
His works are truth and justice;
his precepts stand on firm foundations,
Strongly based to endure for ever,
their fabric goodness and truth.

It is hardly a wonder, given these stories and this description, that one of the great problems for theology has been to show how the

20. F. HACKETT, *HENRY THE EIGHTH* 244 (Star ed. 1931).

21. The struggle between More and Cromwell was more political and less theological than Bolt's play suggests. J. GUY, *THE PUBLIC CAREER OF SIR THOMAS MORE* (1981). And Cromwell's skills were political skills, whatever his theology. F. HACKETT, *supra* note 20, at 235: "He was not a fanatic . . . not a mere Philistine. . . . He was a cold-blooded man of action, with the prime quality for success: singleness of purpose joined to a wide practical vision. . . . He was not a man of unsteady nerves. Nature had given him the useful cortex of a phebman—of the turnkey, the lunatic attendant, the best of thick-set public guardians." What is needed, in order to make a two-kingdoms comparison of More and Cromwell, is a sturdier political theology from the Cromwell side; I don't find that in discussions of him, but one can imagine how it might have been stated—and even that Martin Luther might have stated it. Cromwell was, incidentally, a vigorous anti-Papist, *id.* at 213-214, and his party, particularly after More's death, "had Lutheran leanings." *Id.* at 341.

22. Browning, *Calaban Upon Setebos: Or Natural Theology in the Island*, in F. STEPHENS, E. BECK, AND R. SNOW, *VICTORIAN AND LATER ENGLISH POETS* 1205 (1937).

God of Abraham, Isaac, Jacob—and of Job—is a God who demonstrates in the world both His justice and His mercy.²³ In the Jewish tradition this is a God Who is argued with, is told to see to His own morals, is told even that He ought to be consistent for a change. Professor Abraham Kaplan of the University of Haifa, tells of the Jew in the Warsaw Ghetto, early in World War II, who prayed, “I believe in You, God of Israel, even though You have done everything to stop me from believing in You.” He tells the Hasidic anecdote in which a pious Jew says to God on Yom Kippur, “Sure, I have sinned; but what about you, O God? What about the suffering of innocents, unjust persecutions, the triumph of evil? Let’s call it quits—You forgive me, O God, and I will forgive You!”²⁴ “What is Jewish history,” Elie Wiesel asks, “if not an endless quarrel with God.”²⁵

Or, in trying to say something for Thomas Cromwell, consider the first and greatest of Christian theologians, St. Paul, the Pharisee from Tarsus, who tells his Christian followers in Rome that (Romans 13:1-6, Jerusalem Bible): “[A]ll government comes from God, the civil authorities were appointed by God, and so anyone who resists authority is rebelling against God’s decision. . . . The state is there to serve God for your benefit. . . . The authorities carry out God’s revenge by punishing wrongdoers. . . . [A]ll government officials are God’s officers.”²⁶ St. Paul was not talking about the Environmental Protection Agency or the Indiana State Police. He was talking about Nero and Caligula—about governmental officials who fed Jews and Christians to lions in order to preserve imperial institutions, that is, in the interests of law and order. I can imagine a puzzled convert in the Catacombs reading that letters from Corinth and saying, Okay, but if Nero and Caligula are God’s officers, God must have a special set of rules for officers.

Faithful Christian theologians have had a hard time understanding the God of Israel and of Job, and making sense of St. Paul’s political theology. For the public official—and sometimes for us lawyers, too—it is an enigma. As Martin Luther said, “We are taught nothing of how this rule is to be exercised and carried out, but are only commanded that it should be honored and not resisted.”²⁷ We

23. See Fingarette, *The Meaning of Law in the Book of Job*, 29 HASTINGS L.J. 1581 (1978).

24. Kaplan, *The Jewish Argument with God*, COMMENTARY, Oct. 1980, 43.

25. E. WIESEL, A JEW TODAY 163 (M. Weisel trans. 1978).

26. Isaiah says that Cyrus is God’s anointed, even though Cyrus doesn’t know it (Is. 45:4-7). Luther said “even Satan is ultimately drawn into [God’s] service.” G. EBELING, LUTHER: AN INTRODUCTION TO HIS THOUGHT 186 (R. Wilson trans. 1977).

27. Quoted *Id.* at 186.

are like Rumpole of the Old Bailey: We are given morals for those who must obey, but "she who must be obeyed" has morals of her own. St. Augustine noticed with some small sympathy how the faithful "remain scandalized at [these] differences shown in Scripture."²⁸ His solution involved a distinction between the City of God and the earthly city; in the City of God the faithful live and work and follow the law of love. In the earthly city, earthly rulers live and work and follow other rules. And, still, God is Lord of all, Lord of both.²⁹ All the rules come from God. The medieval theologians, who had to deal more than Augustine with the fact that Christians had become princes, that the Roman emperor had become the Holy Roman Emperor, read the Sermon on the Mount and decided that, when it comes to public and professional life, the radical mandates of Jesus are, as they put it, "counsels of perfection." The Beatitudes are for monks, not for wielders of power.

It was Martin Luther who, more than any other in our Christian tradition, gave this dilemma a name and a structure for ethical thought. Luther was offended by the Scholastic category, "counsels of perfection." He was unable to accept the view that the Sermon on the Mount was only for monks and Romans Thirteen only for subjects. His solution was the moral theology of the two kingdoms.³⁰ In one, the Kingdom of Law, God has, as St. Paul said, instituted civil authority to keep the peace and to punish evildoers. In the other, the Kingdom of Love, God has established love and care for neighbor as a mandate—not as a counsel of perfection, but as a command. And each kingdom, under God, has its own morality. In the first kingdom, the kingdom of tribute, custom, honor, and fear, one obeys with his life, his goods, and his honor. One follows, there, natural reason. In the other, the Kingdom of Love, one obeys with his faith and his books. One is the kingdom of shepherds, one the kingdom of hangmen, and a Christian lives in both, in obedience to both. Called to be a shepherd, a Christian may be a hangman too if his neighbor requires it, because, in one of Luther's colorful and vehement phrases, "Frogs need storks."³¹ As Valparaiso's Dr. Richard P. Baepler put it, "The absolute

28. 3 ST. AUGUSTINE, CONFESSIONS, ch. VII, at 42 (F. Sheed trans. 1942).

29. ST. AUGUSTINE, THE CITY OF GOD (M. Dods. trans., Mod. Lib. ed. 1950); Cranz, *De Civitate Dei*, XV, 2, and *Augustine's Idea of the Christian Society*, 25 SPECULUM 215 (1950).

30. *Secular Authority: To What Extent Should It Be Obeyed?* in J. DILLENBERGER (ed.), MARTIN LUTHER: SELECTIONS FROM HIS WRITINGS (1961), from III WORKS OF MARTIN LUTHER 228-273 (J. Schindel trans. 1930). See also G. EBLING, *supra* note 26, at 186.

31. *Id.* at 389. See Bertram, *Legal Morality and the Two Kingdoms*, THE CRESSSET, Feb. 1957, at 6.

imperatives of the law do their work of terrifying the conscience and breaking through all pretension and hypocrisy."³² God acts in the civil order, but He acts there with a mask; the mask is the fact of Caligula; those who serve Caligula serve God when they obey Caligula. (Notice, please, that we have not yet spoken of Caligula's conscience.)

In modern American Christian theology, some thinkers were chastened by what they saw as the naive simplicity—if not hypocrisy—of America in the 19th Century. They decided that we Americans must realize that it is impossible to act in the world without doing wrong. Theologians such as Reinhold Niebuhr,³³ Paul Tillich,³⁴ and Harvey Cox³⁵ said that those in public life who try to follow the Sermon on the Mount kid themselves and do great harm because they do not understand that justice is one thing and love is something else.³⁶ The best you can hope for in exercising power in the world, as a judge does and as lawyers do, is "the relative good"; you can't follow the law of love in public and professional life; you do the best you can and that is always to some extent evil. If the morality of public and professional life is not exactly a *separate* morality, it is inevitably a *compromised* morality.³⁷ I do not risk claiming a *causal* connection between these thinkers and Luther; I notice only that both schools of thought are on the "yes" side of our question.

So there is something to be said for the view that public and professional life has morals of its own. There is something to be said for the view that we may follow administrative convenience in town as we follow biblical morality at home. Even Atticus Finch demonstrates this point of view. He believed that the ethics of the Christian gentleman provide one morality for public and private life. He did not believe in a separate set of morals for his life as lawyer and legislator. But he was brought by circumstance to the place where his behavior, if not his point of view, was on Cromwell's side of the fireplace and not on More's; he came to behave as if life in town had to have rules of its own. This point gives the novel its theme, or at

32. Baepler, *Religious Challenges to Legalism*, Occasional Paper Number One, Section on Law and Religion, Association of American Law Schools, June 1980.

33. R. NIEBUHR, *MORAL MAN AND IMMORAL SOCIETY* (1932), among several works; see Little, *supra* note 11, and McCann, *Hermeneutics and Ethics: The Example of Reinhold Niebuhr*, 8 J. RELIGIOUS ETHICS 27 (1980).

34. P. TILlich, *MORALITY AND BEYOND* (1963).

35. H. COX, *THE SECULAR CITY* (1966).

36. T. SMITH, *REVIVALISM AND SOCIAL REFORM IN MID-NINETEENTH CENTURY AMERICA* (1958), takes issue with Niebuhr's historical thesis, and J. YODER, *THE POLITICS OF JESUS* (1972), takes issue with his theology. S. HAUERWAS, *A COMMUNITY OF CHARACTER* ch. 5 (1981), compares Niebuhr's and Yoder's ethical claims.

37. Shaffer, *supra* note 19, at 149-152.

least its title; the theme and the title seem to say that a gentleman who is uncommonly devoted to the truth cannot live as truthfully at home as he does in town.

It turns out—the Sheriff tells Atticus, over Jem's unconscious body—that Jem did *not* kill Ewell. Boo Radley killed Ewell. Boo Radley is a recluse. The town regards him as deranged. But throughout the story Boo has secretly befriended the Finch children, and, finally, at the end of the story, has left his hiding place and saved them from a vicious killer. The Sheriff feels that Boo should not be exposed to public gaze; he should remain a recluse. And Atticus, when he realizes what has happened, and after he thinks about it, agrees. As the Sheriff leaves, Atticus turns to his eight-year-old daughter:

“‘Scout,’ he said, ‘Mr. Ewell fell on his knife. Can you possibly understand?’

“Atticus looked like he needed cheering up [says Scout]. I ran to him and hugged him and kissed him with all my might. ‘Yes, sir, I understand,’ I reassured him. ‘Mr. Tate was right.’

“Atticus disengaged himself and looked at me. ‘What do you mean?’

“‘Well, it’d be sort of like shootin’ a mockingbird, wouldn’t it?’ ”

I suspect that this story, and stories like it, do more to make us believers in separate morals than the theologians do. It is hard to sustain a principled disapproval of Atticus Finch. I have tried, and it is hard. We tend—all of us—to sympathize with Atticus, as Scout did, and we do this regardless of our theories. We sympathize even as we admit that Atticus followed different morals in one situation than in the other; in one case he was not willing to lie—not even to protect his own injured son, whom he loved; in the other case he was willing to lie, even though he was a man uncommonly devoted to the truth. Somehow, we say, it is too simple to put Atticus on Cromwell’s side of the fireplace. Or maybe we *do* have to put Atticus there and then see to our theories,³⁸ to say something positive about Thomas Cromwell. It is important for us to see that righteousness is more complicated than we thought it was.³⁹ In fact, to return to

38. Shaffer, *supra* note 14, at 192 n. 22 (where this point is made by Herbert Fingarette); see *infra* note 39.

39. My own view of Atticus’s not killing the mockingbird is that it was a mistake; it was a bad thing to do. It turned on an unsound distinction. At home, he was a patriarch of considerable rectitude, training his daughter to be a lady who could think and act for herself. If the truth had to be told the harm that would come to

the Bible and to the theologians, it is important to us to see that both ways of thinking—telling the truth, and not killing the mocking-bird—are consistent with faith. Both ways of looking at things are consistent with the belief that God is the Ruler of the universe, the Ruler both of truth and of mockingbirds. And in fact the issue is one that is raised *within* the faith. It is an argument among believers. It is an argument about *how* God acts in the world, not an argument about *whether* He acts in the world.

II. AMERICAN LEGAL ETHICS

The doctrine that professional life has a separate morality has been the central theory in American legal ethics for about a century, and, although it shows wear and tear, is now the most prevalent moral justification for our profession. We don't call this theory the doctrine of the two kingdoms or the moral theology of Reinhold Niebuhr. We call it the adversary ethic. It is not argued theologically; in fact, theology had disappeared from the profession's official thinking before the adversary ethic was invented. But the adversary ethic looks like a secular, post-Christian, God-is-dead version of what might elsewhere be called the theology of the two kingdoms. It appeared in our profession's collective morality at about the time lawyers began acting for the robber barons of the American industrial revolution. Or, more accurately, it appeared when lawyers began to defend themselves for acting for the robber barons, and at the same time began to design limits on what a lawyer could do when acting for such clients.⁴⁰ It was stated in many sentences, most of them querulous and tentative, by Judge George Sharswood, in his lectures of 1854 on professional ethics.⁴¹ (Judge Sharswood was the principal theoretician for modern

his son was no argument against telling the truth. In the other kingdom, the official and public kingdom ("in town," as Atticus put it), he was an elitist whose values depended on the official dependence, not to say inferiority, of certain people—women, black people, the feeble-minded. It was not appropriate for Boo Radley to suffer the glare of publicity because Boo, unlike Jem, was not a gentleman and would never become one. He was therefore to be protected where Jem was not. This distinction is faulty on both of two grounds: (1) It fails to see that truth-telling is important enough to justify the suffering of other people; unless truth is important enough to justify suffering it is not as important as it should be. (2) Protecting Boo Radley assumed Boo Radley was and would remain a feeble-minded recluse; it did not esteem him enough—again, as compared with Jem—to take a chance on his being able to live in the light. Nonetheless, Atticus is a hero; he is a real hero. Real heroes make mistakes, but their mistakes, coming as they do amidst what Paul Tillich, *supra* note 34, called "ultimate seriousness," are a way to learn about the character of the hero and about the culture which chooses him to be a hero.

40. Schudson, *supra* note 3.

41. G. SHARSWOOD, *supra* note 2.

American legal ethics; he was also Chief Justice of Pennsylvania and founding dean of the University of Pennsylvania Law School.) Sharswood's 20th century counterparts are usually more forthright, not to say bombastic:

(1) Justice Abe Fortas, defending his former law partner, Thurman Arnold, said,⁴² "Lawyers are agents, not principals; and they should neither criticize nor tolerate criticism based upon the character of the client whom they represent or the cause that they prosecute or defend. They cannot and should not accept responsibility for the client's practices. Rapists, murderers, child-abusers, General Motors, Dow Chemical—and even cigarette manufacturers and stream-polluters—are entitled to a lawyer; and any lawyer who undertakes their representation must be immune from criticism for doing so."

(2) Professor Monroe Freedman of Hofstra University says,⁴³ "Once a lawyer has assumed responsibility to represent a client, the zealousness of that representation cannot be tempered by the lawyer's moral judgments of the client or of the client's cause." He argues that if the client wants to lie in court, the lawyer-as-advocate should help the client lie; if the client appears to be the sort who will use legal advice to do evil, the lawyer-as-advisors should nonetheless give the advice. He argues that the lawyer's fealty, in either case, is to the law, the adversary system, the Constitution, and that this duty requires that professional life have its own morality.⁴⁴

The Influence of Love on Law

Despite appearances, though, the secular version of the two kingdoms—Karl Barth called it the *syndrome* of the two kingdoms⁴⁵—is

42. Fortas, *Thurman Arnold and the Theatre of the Law*, 79 YALE L.J. 988, 1002 (1970).

43. Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191, 199 (1978).

44. M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975).

45. K. BARTH, *EVANGELICAL THEOLOGY: AN INTRODUCTION* 122-123 (G. Foley trans. 1965). It may be more objective to refer to this as an *archetype*. If the tendency to divide one's moral self is archetypal in C. G. Jung's sense—*cf.* ON THE NATURE OF THE PSYCHE 110-126 (R.F.C. Hull trans. 1960)—it is not to be accounted for normatively; it just *is*, and ethical theory has to cope with what is. One might, in that way, take into account as inevitable our tendency to distinguish between the morals with which we deal with strangers and the morals with which we deal with intimates; compare Toulmin, *Ethics and Equity: The Tyranny of Principles*, 15 GAZETTE 240 (1981), with Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RIGHTS 1 (1975). If the tendency to divide oneself morally is a cultural phenomenon, on the other hand, one seems to have a choice between taking moral responsibility for the division—as

not the same as the *theology* of the two kingdoms. It is not fair, even as a matter of history, to associate the two. Martin Luther thought that the result of his theology would be that the kingdom of love would overcome the kingdom of law, would convert it. He told Christian princes to look to their motives;⁴⁶ the doctrine that Caligula was God's minister should give moral comfort to those who were told to obey Caligula, but it could not give moral comfort to Caligula himself. The Christian prince's power, Luther said, should be used for the benefit of the prince's neighbors,⁴⁷ his sisters and brothers in Christ: "For cursed and condemned is every kind of life lived and sought for selfish profit and good; cursed are all works not done in love [and] . . . directed with all one's heart, not toward selfish pleasure, profit, honor, ease and salvation, but toward the profit, honor and salvation of others."⁴⁸ It may be that the prince, as prince, need not follow the morality that tells him to turn the other cheek, walk the second mile, and give up his cloak with his coat. But he must, in using the power of the state, use it with righteous motives. There is a distinction in Luther's teaching between the morals of the office and the motives of the officer.⁴⁹ In exercising the coercive power of the state, the Christian prince depends on the law and not on love, but the exercise itself, what goes on in the officer's heart, is not governed by the earthly kingdom; in his heart the Christian officer is in his faith and in his books; he lives there in the Kingdom of Love.

I think, Reinhold Niebuhr's theological ethics does—or announcing a judgment against the world and a consequent withdrawal from much of what the world does, as, I think, John Howard Yoder's theological ethics does. See two related essays: McCann, *supra* note 33, and S. HAUERWAS, *supra* note 36. Christianity, at least since Augustine, has insisted that a human person is undivided; whenever he acts he acts as a single self and the issue posed by the syndrome or archetype is an issue of moral integrity. The tendency to divide oneself morally is therefore a failing, is in some sense sinful. This point does not distinguish one Christian moral theology from another; it is rather a point that Christian ethics has to take as given. Shaffer, *supra* note 19, at 28.

46. *Supra* note 30.

47. *Id.* at 392-402; Luther gives, at 401, the example of Charles Duke of Burgundy who had to deal as judge with the folk-story situation in which a virtuous woman attempts to save her husband (in song, sometimes, to save her brother) by submitting to the sexual demands of a tyrant. The tyrant imposes himself on the woman but kills the husband (brother) anyway. The Duke in Luther's story forced the tyrant to marry the virtuous woman then had the tyrant beheaded. "Thus," Luther says of the Duke, "he punished the crime in a princely way." The example resembles Shakespeare's "Measure for Measure."

48. *Id.* at 393.

49. *Id.* at 394. It is important to notice that Luther's treatise was addressed to the Duke of Saxony; it was a *ruler* who was the object of the great reformer's pastoral concern.

Dr. Baepler expresses this point in an interesting comparison of the way love influences law and law influences love. Love, acting in and acting through people in the Christian community, has and should have an influence on the same people when they act in the secular state, that is in the law or in the government. Law, when it interacts functionally with love, comes to understand its own limitations. When we act in the earthly kingdom we have power and legitimacy but we have a poor imagination. Government cannot imagine much of anything beyond its own survival. The kingdom of love, because it knows that God is Lord of all, and that God loves His people, imagines a destiny in which survival is not important but obedience is. Here political theology is entirely different from secular formulas such as the adversary ethic.⁵⁰ Professor Freedman can say that the lawyer who helps a scoundrel be a scoundrel is not really serving the scoundrel but is instead serving the Constitution. But that is only a grand way of saying that the lawyer is serving the government, and when it is put *that way*, one is likely to notice that if the adversary is an ethic at all, it depends on the conviction that the government can produce goodness.⁵¹ It is even worse than that; the Freedman argument depends, it seems to me, on the expectation that the government *will* produce goodness. Luther knew better than that, and so should those of us who know about the Holocaust, Hiroshima, Dresden, Viet Nam, and Selma; about *Roe v. Wade*, the fugitive-slave laws, and yellow-dog labor contracts. Even though, as Karl Barth says, there may be a blessing in government,⁵² government cannot be depended upon to produce goodness.

Luther's teaching had two important points to make about this, to the faithful, two points on humility. One deals with humility about living in the kingdom of the law; the other deals with appropriate humility about oneself. In making the first point, Luther told us to remember that the kingdom of the law cannot save:⁵³ "It pleases the divine will that we should call his executioners noble lords, fall at their feet, and be subject to them with all humility," he said, "as long as they do not extend their task too far and seek to become shepherds instead of executioners." The Christian will not find salvation in the state. That is not a 16th Century argument; it is St. Augustine's argument against Eusebius of Caesarea;⁵⁴ in worldly terms Augustine lost

50. Baepler, *supra* note 32.

51. Shaffer, *supra* note 19, at 135-142.

52. K. BARTH, THE WORD OF GOD AND THE WORD OF MAN 303 (D. Horton trans. 1978).

53. G. EBELING, *supra* note 26, at 187.

54. *Supra* note 29, Book Four, ch. 31; Book Fifteen, ch. 2; Book Nineteen,

that argument. The medieval notion of civil society came over his objection.⁵⁵ It is the argument of Karl Barth against the Nazi regime, in 1935, in Germany;⁵⁶ Barth was convinced that the deepest danger from Hitler was that Hitler claimed to be a shepherd. Barth confronted the regime, lost his academic appointment, left the country. He put on a Swiss sergeant's uniform and got ready to go to war.⁵⁷

On the second point, Luther's doctrine is not a way for the children of light to feel superior to the unenlightened; Luther taught that we are all unenlightened:⁵⁸ "It is the nature of God that he makes something out of nothing. Consequently, if someone is not nothing, God can make nothing of him. Men make something into something else. But this is vain and useless work. Thus God accepts no one except the abandoned, makes no one healthy except the sick, gives no one sight except the blind, brings no one to life except the dead, makes no one pious except sinners, makes no one wise except the foolish, and, in short, has mercy upon no one except the wretched, and gives no one grace except those who have not grace." It is important not to be misled by Luther's teaching to suppose that the kingdom of love is where Christians are and the kingdom of law is for the heathen. He is not talking about people; he is talking about behavior: We are all heathen.⁵⁹ Many modern Christian theologians, expanding on what Reinhold Niebuhr taught in the 1930's, would say that the moral life in the world is a life of finitude, of limitation, of coping with claims

ch. 23; Wilken, *Pagan Criticism of Christianity: Greek Religion and Christian Faith*, in W. SCHOEDEL AND R. WILKEN (eds.) *EARLY CHRISTIAN LITERATURE AND THE CLASSICAL INTELLECTUAL TRADITION*; Cranz, *supra* note 29.

55. Professor Robert E. Rodes, Jr., of Notre Dame comments on this point: "The medieval notion of civil society did not, as I understand it, regard civil society as salyific. It was perhpas more incarnational than post-medieval society (Luther's and the Counter-Reformation's), but salvific only in the sense that all life in this world is a place where we must work out our salvation and a place where we are to discuss the presence of God." That is a useful comment; see also McBrien, *The Reformation: A Catholic Reflection*, 38 *THEOLOGY TODAY* 298 (1981). But Rodes's argument does not touch my major point here: I am talking not so much about those who seek salvation in the state as those in the state who claim to offer salvation. K. BARTH, *supra* note 52, at 273-327.

56. Herberg, *The Social Philosophy of Karl Barth*, in K. BARTH, *COMMUNITY, STATE, AND CHURCH* 30, 38-55 (1968).

57. E. BUSCH, *KARL BARTH: HIS LIFE FROM LETTERS AND AUTOBIOGRAPHICAL TEXTS* 226-243, 257, 261, 273, 358 (J. Bowden trans. 1976). Elie Wiesel says that era in German was "a black road . . . strewn with corpses . . . substituting itself for God." E. WIESEL, *supra* note 25, at 14.

58. G. EBELING, *supra* note 26, at 134-35.

59. Bertram, *supra* note 31; Pannenberg, *Freedom and the Lutheran Reformation*, 38 *THEOLOGY TODAY* 287 (1981).

that are inevitably ambiguous, contradictory, from more than one righteous source. The earthly city is a fallen city; it is a place of tension and discomfort, even for the faithful—or, maybe, especially for the faithful. But it is in the sinfulness of living in such a place that the believer is forgiven. That, I think, was Luther's point.

Politically, it is also important to notice that Luther's position was similar to St. Paul's teaching about the Rome of Nero and Caligula, and similar to St. Augustine's teaching about the Roman Empire after Constantine.⁶⁰ Paul's political problem was to make it clear to Christians that they were not called to be part of movements of terrorist subversion. Paul had the same problem with the Zealots that Jesus had had with Judas Iscariot. Augustine's political problem was to make it clear to Christians that they could not live outside the earthly city; they had to live *in* it, in a positive way; but it was still the earthly city. Luther stood amidst turbulent cultural and political change in the 16th century; some of the turmoil was probably of his own making, and some resulted from the other giants of the Reformation, but there would have been turmoil in any case and the medieval order would have come apart anyway. In the words of an old poem about Luther,⁶¹ "His mind was the battle-ground of two ages—I do not wonder that he saw demons!"

This political point needs a bit of expanding. I am not saying here that Paul, Augustine, Luther, and Karl Barth were putting fences around a Christian enclave. They were not doing that; nor were they being expedient—coming to terms with the world so that Christians could be safe in it. Their argument—and this is Dr. Baepler's point, too, I think—is much grander than that. The City of God does not depend upon the earthly city. But the earthly city depends upon the City of God. Paul and Augustine and Luther and Barth were interested in showing that the influence of faith on the earthly city is a necessary influence.⁶² Their arguments were arguments *to the faithful*, about what

60. *Supra* note 54.

61. Ferdinand, *Huttens letzte Tage*, quoted and translated at *supra* note 26, at 23.

62. K. BARTH, *supra* note 56, at 479-80. There is a difference, though; Gloesch, *Karl Barth and the Life of the Church*, 1 CENTER J. 65, 70-71 (1981), quoting K. BARTH, *supra* note 56, at 185: "In opposition to the emphasis in Lutheran theology, Barth contends that the gospel has priority over the Old Testament law and indeed contains the law within itself. The law is the form of the gospel, and the gospel is the content of the law. The law is not just a preparation for the gospel but an embodiment of the gospel as the latter is applied to the concrete problems of life. . . . The church proclaims Jesus Christ not only as Savior of the world but also as Lord of every dimension of life, and this means that the gospel proclamation will inevitably challenge the

the faithful imply when they claim the freedom to be faithful. The political reason for the faithful being faithful is that their faithfulness constitutes a claim on civil society.

Luther argued to Christians who were rulers and to Christians who were subjects; to both he said that the Gospel requires Christians to do the work of the earthly city.⁶³ The Gospel forbids the faithful from resigning from civil society, as much as it forbids them to use coercion in matters of faith.⁶⁴ He stood against the Anabaptists on one side, against the Inquisition on the other. Luther's political environment was one in which there were strong parties for each of those, as he regarded them, erroneous points of view. He was pressed on one side by those who wanted to live apart⁶⁵ and on the other side by those who wanted to use criminal punishment against heretics. His political argument *today* says, to us who enjoy a more elaborate freedom of conscience, but who live in society of strangers, that the Kingdom of Love influences the Kingdom of the Law—that it lifts it up—and that the Kingdom of the Law could not survive if it were not lifted up.⁶⁶ This is also what the framers of our national Constitution had in mind when they separated church and state; their object was to assure the *freedom* of the church so that the *influence* of the church would be assured. They did not suppose that democratic government would be independent of the influence of the church, or that democratic government could survive if it were.⁶⁷

The admonition to the faithful, to serve in the earthly city but to refuse there to use coercion against the human spirit, is illustrated, I think, in the political life of a modern giant of the earthly city, who was as well a giant among the faithful—Dag Hammarskjöld. Ham-

ruling principalities and powers of every age. Barth laments: 'it is a bad sign when Christians are frightened by "political" sermons—as if Christian preaching could be anything but political. And if it were not political, how would it show that it is the salt and the light of the world?' " Pannenberg, *supra* note 59 at 293, argues that Lutherans, more than Luther himself, made the separation of the political and the theological a juridical separation.

63. The only permissible reason for having power, or wanting it, is service. Barth seems to be solidly in Luther's tradition when he says, *supra* note 56, at 177: "[A]ll ruling that is not primarily a form of service [is] a diseased and never . . . normal condition."

64. *Supra* note 30, at 389-91; thus ministry, narrowly defined, is persuasion, *id.* at 392.

65. C.-P. CLASEN, ANABAPTISM: A SOCIAL HISTORY (1972); *supra* note 26, at 184-85.

66. See Scholler, *Martin Luther on Jurisprudence—Freedom, Conscience, Law*, 15 VAL. U.L. REV. 265, 270 (1981).

67. W. BERNIS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY (1976); see my review at 40 REVIEW OF POLITICS 271 (1977).

mar skjold's work for world peace was, for all that appeared, a secular enterprise. It was only after his death and the discovery of his secret diary, *Markings*, that the world learned that he was a deeply spiritual, committed Christian.⁶⁸ The world was surprised and embarrassed at that, but, from the standpoint of Lutheran teaching, it was nothing to be surprised about. As Professor Bernhard Erling of Gustavus Adolphus College put it recently:⁶⁹

Hammar skjold's religious faith did not prescribe specific political answers to the world's problems—answers which those of other religious traditions might not have found acceptable. He may have been helped at this point by his Lutheran tradition, which is not theocratic in its approach to government; that is, it does not teach that the civil government should in all respects conform to a specially revealed divine will, but teaches that human beings should be able through the exercise of reason to negotiate a consensus as to how a government should be organized and managed. There are, according to Lutheran teaching, 'two kingdoms.' There is a kingdom ruled by law—a law that can be coercively enforced, but which should represent a consensus among those governed by it. And there is a kingdom ruled by love and persuasion, which can influence the kingdom ruled by law, but in this latter kingdom coercion is not used to enforce the way of life which love prompts.

But, still, love does prompt a way of life; it explains ways of life such as Hammar skjold's.⁷⁰

So there is a radical and important difference between the modern view that public and professional life has a morality of its own, and the Christian theology of the two kingdoms. There is a difference, but the difference does not, I think, finally dispose of the difficulties of the deeper and older political theology that Luther taught. It remains the case that the Reformation freedom Luther preached caused the ordinary people of his time to suppose that a new political era was going to result from the freedom consequent on Reformation doctrine. It was then and has since been a problem for two-kingdoms theories because it was a problem in the beginning,

68. W. McCLENDON, *BIOGRAPHY AS THEOLOGY* 39-64 (1974).

69. Erling, *Discipleship at the United Nations: Hammar skjold's Religious Commitment*, 98 THE CHRISTIAN CENTURY 902, 903 (1981).

70. Hauerwas and Shaffer, *supra* note 19, at 205-06.

when Luther told Protestant princes they could—and should—meet revolt with ruthless suppression. The Protestant peasant in the Protestant dungeon in 16th Century Germany must have wondered what happened, as much as the Jewish or Christian martyr in Rome did when St. Paul told him that Nero was God's officer. But Luther's theory, at least, warns us modern Christians that our freedom is capable of being corrupted, that we continue to need contrition, and that without contrition and discipline Christians develop both contempt for useful government and untruthful optimism about the triumph of righteousness in the world. The Kingdom of the Law cannot save us, but it helps us keep our feet on the ground.⁷¹

American history—especially the history of the church in America—vindicates Luther's wariness at both undue contempt and undue optimism.⁷² The way American Christians thought of their country prior to the Civil War—as a "righteous empire," to use Martin Marty's phrase,⁷³ or as "God's new Israel," to use Thomas Jefferson's phrase⁷⁴—was untruthful. And in its untruthfulness it was wicked; it was a society which in those days could glory in the blessed assurance of the Revival and at the same time nourish slavery, manifest destiny, and the suppression of women.⁷⁵ Undue contempt and undue optimism. America is a society which in these days can glory in America's special mission in human history and at the same time take money from the poor in our country and sell weapons to foreign tyrants. What I am calling undue contempt with undue optimism is perhaps what Reinhold Niebuhr called the irony of American history. What I have read in the newspapers in the last six months suggests to me that it might be useful to recall what Niebuhr said when the post-war anti-communism of Sen. Joseph McCarthy was astir in our country:⁷⁶

If we should perish, the ruthlessness of the foe would be only the secondary cause of the disaster. The primary cause

71. Baepler, *supra* note 32; I. H. THIELICKE, *THEOLOGICAL ETHICS* xi-xxii (W. Lazareth ed. 1966).

72. Hauerwas and Shaffer, *supra* note 19, argue that optimism is not hope when it lacks truthfulness, as truthfulness is not hope when it lacks optimism.

73. M. MARTY, *RIGHTEOUS EMPIRE: THE PROTESTANT EXPERIENCE IN AMERICA* (1970).

74. R. NIEBUHR, *THE IRONY OF AMERICAN HISTORY* 25 (1962); see P. MILLER, *THE LIFE OF THE MIND IN AMERICA* (1965).

75. Welter, *The Cult of True Womanhood: 1820-1860*, 18 *AM. Q.* 151 (1966), also in E. PRESSEN (ed.), *THE MANY-FACETED JACKSONIAN ERA* 46-69 (1977); Herman, *Loving Courtship or the Marriage Market? The Ideal and Its Critics, 1871-1911*, 25 *AM. Q.* 235 (1973).

76. R. NIEBUHR, *supra* note 74, at 174.

would be that the strength of a giant nation was directed by eyes too blind to see all the hazards of the struggle; and the blindness would be induced not by some accident of nature or history but by hatred and vainglory.

The Morals of the Task

An argument that may trace to Luther's reasoning, or at least that resembles it, is the argument that each office has a moral logic of its own, an inherent morality that is defined not by the person's status or order but by the nature of the work he is given to do.⁷⁷ The government agent in the Mark Trail comic strip claims he is doing his job when he accuses Mark of theft; he acts there *as* government agent, and the logic of that job requires that he suspect an honest man of theft. Albert Speer, Hitler's architect, told himself he need not worry about Hitler's slave-labor camps because his job was to be an architect, and the logic of that job required single-minded devotion to the design of great buildings.⁷⁸ Martin Luther told the Christian hangman that he may deliver death to his brother or sister because the punishment of evildoers is the job of the hangman, and a Christian, in doing his job, serves his neighbor; the law of love pertains in that case to the hangman's regard for the evildoer, not to what he does to the evildoer.⁷⁹ The moral logic of the task is familiar in modern lawyers' defense of the adversary ethic: The damaging cross-examination of a truthful witness, or assisting the perjurious client in his lie to the judge and jury, are familiar cases in the debate.⁸⁰ Those who disagree with the morals of the task speak of systematic immorality and of a dubious professional dispensation from moral responsibility.⁸¹ But defenders speak of equality, due process, and the administration of justice.⁸²

The morals of the task do require that one consider the legitimacy of the task to be done. It may be immoral to hang an innocent man, for example. But, if the task is legitimate, the worker may base his moral decisions on the logic inherent in the task. The claim is not a claim for special orders of people — orders such as nobility, clergy,

77. See G. EBELING, *supra* note 26, at 180-81.

78. Hauerwas and Burrell, *Self-Deception and Autobiography: Reflections on Speer's Inside the Third Reich*, in S. HAUERWAS, TRUTHFULNESS AND TRAGEDY 82-98 (1977).

79. *Supra* note 30; Baepfer, *supra* note 32.

80. *Supra* notes 43, 44; Little, *supra* note 11.

81. Wasserstrom, *supra* note 45; Jones, *supra* note 5; Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CALIF. L. REV. 669 (1978).

82. *Supra* notes 42, 43, and 44.

aristocracy, and so forth—so much as a claim based on the legitimacy of tasks—preaching the Gospel, administering the government, managing corporate business, pleading cases for those who have a civil right to a lawyer, seeing to the survival of institutions that appear to be useful. The lore of our profession provides familiar legal examples: The American adversary ethic claims its ancestral analogue in the ideal of the English barrister, the courtroom lawyer who traveled around with the king's judge and took in court whatever side needed taking. The lawyer stepped forward where he was needed, when he was needed, and made sure the judge considered all of the facts and all of the law. It was a professional task based almost on hypotheses—as if I would say to one of you, "Please argue that the world is flat, so that we can be sure to be fair to the flat-earthers." That would be a useful thing to do, and you could in moral confidence do your job as you were asked to do it. You would not need to *believe* the world flat in order to argue, for the common good, that the world is flat. The English-barrister ideal was, in purest theory, like that. He was, as Professor Geoffrey Hazard of Yale puts it, "not merely an 'officer' of the court but a member of it."⁸³ When, for another example, a lawyer invents a legal fiction in order to conform present reality to past theory, we allow him a bit of righteous dishonesty because fiction is an inherent part of legal reasoning; it is all right, on behalf of the plaintiff who complains that his cow was stolen, to say that he lost it and that the defendant found it.⁸⁴ It is implicit in the legitimate task of making law fit life.

The principle complaint of critics of this morality of the task is that a moral agent cannot be divided up in this fashion—cannot be a person one moment and a doer of jobs the next. In morals, according to these critics, only a person acts, always a person, always and only a whole person.⁸⁵ If he acts to deny or to diminish his being a person, he seems to act immorally—this both as a matter of reason and as a matter of consequences:

(1) Prof. John Noonan, meditating on the lawyer who bribed the judge, and quoting Charles Curits, says,⁸⁶

'You devote yourself to the interests of another at the peril of yourself. Vicarious action tempts a man away from

83. Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1071 (1978).

84. W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 66-67 (2nd ed. 1955).

85. *Supra* note 45.

86. Noonan, *supra* note 8, at 230.

himself. . . . While I understand the attractiveness and even the inescapability of the catch phrase, 'I'm doing it for my client,' I also see the phrase functioning as a kind of carapace. The phrase functions as a defense against various moral claims, a defense against responsibility. If a lawyer can utter this incantation and can take it seriously enough, responsibility and the feelings accompanying it are shifted to the client.

The fault is like the one St. Augustine confessed from his days as a Manichean: "I very much preferred to excuse myself and to accuse some other thing that was in me but was not I." Prof. Noonan's argument is that one who reasons vicariously does not reason as a moral person at all. St. Augustine would have said the attempt is destructive: "My two wills . . . were in conflict and in their conflict wasted my soul."⁸⁷

(2) Father David Burrell and Professor Stanley Hauerwas, of Notre Dame, meditating on Albert Speer's old age of regret, say,⁸⁸ "He had no effective way to step back from himself, no place to stand. His self-deception began when he assumed that 'being above all an architect' was a story sufficient to constitute his self. He had to experience the solitude of prison to realize that becoming a human being requires stories and images a good deal richer than professional ones, if we are to be equipped to deal with the powers of the world." The argument here is that Speer's thinking of himself as an architect—his thinking of himself in the third person, to use Robert Bolt's phrase⁸⁹—led to his inability to think of himself as anything else.⁹⁰ Self deception lies in that direction; vicarious morality leads to excuses for monumental horrors with phrases such as "acting in a good cause," or "acting as God's representative," or excusing the exploitations of social prestige or honor or recognition or wealth by saying that one's task requires status.⁹¹ It led Speer to such a position, as master of the manpower apparatus of the Third Reich—that is to the management of Hitler's slave-labor camps. Schizophrenia is

87. *Supra* note 28, Book Five, ch. 9, at 79.

88. *Supra* note 78, at 93.

89. *Supra* note 18, at x.

90. Another way to put this is to say that being a human person involves moral demands that transcend roles. This would not *reject* the morality of task but would say that being a human person is a transcendent task; it transcends and orders other tasks. I am grateful to Prof. Rodes for this point; he mentioned S. HAUERWAS, *supra* note 78, at 57-70.

91. Peter, *supra* note 11.

not only a disease; it is also a metaphor for bad reasoning and bad consequences.⁹² It is the business of a moral person to confront evil means as much as evil ends, and if evil means are inherent in a task, to confront the people in institutions who require the task to be done. It is the business of a moral person to live as one who defines himself and his community in terms broad enough and hopeful enough to obey the Law of Love in his jobs and in the way he does his jobs. There may be such a thing as necessary harm—the moral life is impossible without harm to oneself and to others—but there is no such thing as necessary evil.

III. THE DOCTRINE OF ONE KINGDOM

There are theologians and lawyers who do not accept the theology of the two kingdoms—even though, I think, almost all of them have been influenced by it and have learned to take it into account. There are lawyers and judges who do not accept the adversary ethic. Many of us believe and try to live as if there is only one kingdom, as there is only one God, and as if there can only be one morality in our lives, a single morality to govern both personal life and professional life. Many of the lawyers and judges who belong on this side of the argument agree with Atticus Finch—"I can't live one way in town and another way at home"—but they don't say much about it. I like the way Prof. Harry Jones of Columbia puts this point: "The restraining influence that good lawyers have had on even their most avaricious clients is a significant story that should be told far more often than it is. . . . Men of large affairs do not select their legal advisers entirely or principally for ethical insensitivity."⁹³ Prof. Jones argues that many lawyers who defend the adversary ethic find it too cynical to be lived.

If you go back before 1850 in American and English legal thought, you do not find two kingdoms; you find only one. This is evident in the common law as our American forebearers received it from Blackstone. In *Moses v. McFerlan* (King's Bench 1760),⁹⁴ the source of the common law of restitution, for example, Lord Mansfield said: "If the defendant be under an obligation from ties of natural justice, the law implies debt, and gives [relief] founded in the Equity of the plaintiff's claim . . . to recover money which ought not in justice to be kept." And this despite the fact that the apparent rule of law pointed in the opposite direction. There is not one rule of law and another

92. H. FINGARETTE, *SELF-DECEPTION* (1969).

93. Jones, *supra* note 5, at 973.

94. 96 English Reports 120, 97 English Reports 676.

rule of morals; there is only one rule, of law and of morals, of law and of *justice*, and that rule forbids unjust enrichment. If limits are to be placed on what the law does they will be limits of ability and of prudence, not limits that claim a separate morality for public and professional life.

This common-law tradition was the most prominent jurisprudence of American and British appellate courts until well into this century. I like best the way it was expressed by James Wilson, a sturdy Scots Presbyterian from Philadelphia, a signer of the Declaration of Independence and one of the first justices of the Supreme Court, who said, in an early case: "A state I cheerfully admit, is the noblest work of *Man*.⁹⁵ But *Man himself* . . . is . . . the noblest work of God." The noblest work of God lives one life, one morality, in town and at home, and both places must take account of the Father of this noble work.

The sources of this view are, like the sources of two-kingdoms ethics, deep and ancient. One source is Judaism: In the Jewish Bible—the Old Testament of the Christian Bible—to say that a person was just was to say that he was righteous, that he lived his entire life in conformity to the covenant that Israel had with God. In this view, love and justice are the same thing.⁹⁶ If distinctions must be made between a person's life in institutions and his life with his neighbors, they are distinctions based on the melancholy fact that we are not as put together, in ourselves and among ourselves, as God wants us to be. But with God's loving help we find ways in communicating with one another, of mediating our unfortunate separateness, and one of these ways is the law. Law is one of the means we use to work out what Father Richard McBrien of Notre Dame calls our "imperfect harmonies."⁹⁷ And our imperfect harmonies express how difficult it is to love one another. This, I think, is the Jewish way of looking at the one kingdom: If the God of Israel takes the lands of other nations and gives them to Israel, He nonetheless acts for the good or the

95. *Chisholm, Executor, v. Georgia*, 2 Dallas 419, 462-463 (1792). *Id.* at 455; "Man, fearfully and wonderfully made, is the workmanship of his all perfect Creator: A State; useful and valuable as the contrivance is, is the *inferior* contrivance of *man*; and from his *native* dignity derives all its acquired importance."

96. Schweid, *The Authority Principle in Biblical Morality*, 8 J. RELIGIOUS ETHICS 180 (1980): In, for example, the story of Cain and Abel, two sources of morals are shown, obedience and self-fulfillment. But these are not opposites; they are complementary, "love being the hidden source of awe, and awe the hidden source of love." See also Fingarette, *supra* note 23.

97. II. R. MCBRIEN, CATHOLICISM 983 (1979).

other nations; we may not understand how that is so,⁹⁸ but we know that it is so, and we obey God and praise Him for His truthfulness and for His justice.

Another ancient source of the one-kingdom view is Greek thought, and particularly the ethics of virtue in Greek thought. Aristotle, for example, conceived of the moral life as a matter of virtues, and of the ideal public and professional person as a virtuous person. The Greek word for virtue means a perfected power, which in turn suggests a moral life in which the creature behaves according to its nature, as its Creator made it to behave.⁹⁹ In this view of things, the purpose of the law, and its source, is the nature of human persons, and the moral universe that is implicit in nature is the source of the legal universe.¹⁰⁰ All of this, both law and morals, flows from the law of nature—from what our Declaration of Independence calls “the Laws of Nature and of Nature’s God.”

This is a monolithic theory, and since I here speak of it in a positive way maybe I can be excused for using a story that pokes a little fun at it. William James once gave a lecture on cosmology. After the lecture a woman who had been listening came up and said to him, “Mr. James, you have it all wrong. The world is not as you say. The world rests on a giant turtle.” He meditated on that for a respectful moment and then asked her, “If that is so, can you tell me what the giant turtle rests on?” Yes, she said, she could; it rests on a second and even larger turtle. And before he could ask anything more, she interrupted him: “Wait, Mr. James. I know what you’re going to say, but it’s no use. I’m afraid it’s turtles all the way down.”

If the kingdom is one, and turtles all the way down, the question of importance may be how we know that and how we determine what it means. The charge here is that such a theory rests on intuition, that it is not derived logically from moral principles. One way to answer that would be to cite William James again—So much the worse for logic.¹⁰¹ Another way to answer it would be to claim the ability to formulate perceptions of nature in codal propositions. On the whole I would rather admit to intuition, and to avoid codes, but

98. Psalm 119: 17-18 (King James Version):

Open thou mine eyes, that I may behold wondrous things out of they law.
I am a stranger in the earth: hide not thy commandments from me.

99. S. HAUERWAS, *supra* note 36, at 111.

100. McBrien, *supra* note 55.

101. W. JAMES, *THE VARIETIES OF RELIGIOUS EXPERIENCE* 72-74 (1902) (Modern Library ed.).

to say that is not to say that intuition is a weakness. Intuition is not a bad way to know something; C. G. Jung called intuition the ability to see around corners,¹⁰² and that is not a bad ability to claim for lawyers. But, having admitted to an intuitionist theory, I also claim empirical validity for what I learn by intuition. I will, at least, leave the charge of intuitionism aside and see if I can show how the perception of turtles works in the law and therefore in the moral lives of lawyers. I want to look at the behavior of judges and lawyers, at cases in which virtue, in a turtle's sense of the term, works. This may be to see how lawyers and judges, in their official behavior, if not in their thought, deny the proposition that public and professional life has a separate morality:

Case One. My jurisprudence teacher at Notre Dame, Professor Robert E. Rodes, Jr., told us a story about a young couple who got on a boat in China to come to the United States and settle here. While they were on the boat on the Pacific Ocean, the wife had a baby. When they landed and went through the immigration process in San Francisco, the baby was found to have no visa. He didn't even have a passport. Both of the parents had visas and passports. The immigration official involved cabled to Washington, asking what he should do. The answer he got by return wire was, "Don't be a damned fool."¹⁰³ The bureaucracy need not have as separate morality; it need not have a rule for everything. An immigration official deals with the noblest work of God and should behave as if he knew it.

Case Two. In Benet's play, "The Devil and Daniel Webster," Jabez Stone sold his soul to the Devil, and the Devil came to collect it, and Stone hired Webster to represent him. The Devil presided at the trial. Webster won the case by demanding a jury trial—even though the jury was made up of the greatest scoundrels in human history, all of them dredged up from the depths of hell. The Devil, who controlled the jury lists, thought these subjects of his would enjoy having Jabez Stone's company. Webster won because he invited them to ignore the literal purport of Romans Thirteen;¹⁰⁴ he said to the jury, "Look, this Jabez Stone is a *man*. And you, too, are *men*. You are not devils,"¹⁰⁵

"He was talking about the things that make a country a country, and a man a man.

102. C. G. JUNG, ANALYTICAL PSYCHOLOGY (1968); see T. SHAFFER, LEAL INTERVIEWING AND COUNSELING 52-54 (1976); Shaffer, *supra* note 15.

103. R. RODES, JR., THE LEGAL ENTERPRISE 101 (1976).

104. Rom. 13:2: "Anyone who resists authority is rebelling against God's decision" (Jerusalem Bible).

105. II SELECTED WORKS OF STEPHEN VINCENT BENET 42-43 (1942).

"And he began with the simple things that everybody's known and felt—the freshness of a fine morning when you're young, and the taste of food when you're hungry, and the new day that's every day when you're a child. He took them up and he turned them in his hands. They were good things for any man. . . .

". . . Then he turned to Jabez Stone and showed him as he was—an ordinary man who'd had hard luck and wanted to change it. And, because he'd wanted to change it, now he was going to be punished for all eternity. And yet there was good in Jabez Stone, and he showed them that good. He was hard and mean, in some ways, but he was a man. There was sadness in being a man, but it was a proud thing too. And he showed what the pride of it was till you couldn't help feeling it. Yes, even in hell, if a man was a man, you'd know it. And he wasn't pleading for any one person any more, though his voice rang like an organ. He was telling the story and failures and the endless journey of mankind. They got tricked and trapped and bamboozled, but it was a great journey. And no demon that was ever foaled could know the inwardness of it—it took a man to do that."

Case Three. In *Terminiello v. Chicago*,¹⁰⁶ the Supreme Court held for a repulsive rabble rouser whose speech was so objectionable that his listeners threatened to riot. The court said the police had to protect the speaker, not silence him. There are two ways to look at that decision: One—and the most popular—is to explain the case quantitatively, as a matter of the greatest good for the greatest number; Terminiello was allowed to speak because of the "marketplace of ideas," because a democratic state has to hear from everybody who wants to be heard from, even a scruffy anarchist. He is protected, not for himself, not because he is the noblest work of God, but as a means to a political end. The lawyers and judges who seem to serve Terminiello are in fact acting for the Constitution, for democratic government, for the good of the state. This way of explaining the case is a public-square adversary ethic; it depends on a political Darwinism in which one expects that the best ideas will survive. Another way to explain the case, and the one I prefer, is to say that Terminiello was a human being who needed to communicate with other people, as we all do, and that is one thing not even the welfare of the majority—not even civil peace—can interfere with.¹⁰⁷ Theologically,

106. 337 U.S. 1 (1949).

107. Rodes and Shaffer, *Law for Those Who Are to Die*, in H. FIEFEL (ed.), *NEW MEANINGS OF DEATH* 291, 303-305, 309 (1977).

God speaks to us in the *person* of the other, who stands before us as Christ—not just in his speech but in his *self*.¹⁰⁸

Case Four. Consider workmen's compensation law as it is applied to the errant worker. The law says administrators and courts have to take it into account that people do strange things when they're put on assembly lines. They fool around, for instance; they wrestle and sneak drinks and then slip and get hurt by machines. Nonetheless, they are within the scope of their employment for compensation purposes when they do these unwise, crazy, human things.¹⁰⁹ (Chesterton said that madness is not irrationality, but, rather, the absence of anything but rationality.) Or they get hurt enough that they can't work, and then get depressed and kill themselves. Many courts say these deaths are within the scope of employment, too, and that the widows of these victims of suicide are entitled to compensation.¹¹⁰ The important thing is not so much the efficiency of the industrial state as the way people are when they are put in an industrial state. The industrial state is not allowed rules of its own, rules which define the noblest work of God as if he were a machine.

Case Five. Or consider the rescue cases in tort. It is said to be a rule of the common law of tort that no one has a duty to rescue a stranger in peril.¹¹¹ But it is also a rule that if one attempts rescue and is himself hurt, the author of the original peril is liable to the rescuer.¹¹² "The risk of rescue, if only it be not wanton, is born of the occasion," in Judge Cardozo's phrase.¹¹³ It is also a rule that when one begins rescue, he can't give it up carelessly; he can't let the victim fall back in the river because it turns out that he's heavy.¹¹⁴ What the common law seems to say here is that it is a good thing to rescue a stranger in peril, even if the law hasn't enough spunk to make you do it. Here the law recognizes and accepts its failure to be separate.¹¹⁵

Case Six. One of the curiosities of slave-holding America was the fact that slaves were not subject to punishment by their masters for

108. See K. BARTH, *THE HUMANITY OF GOD* 77 (T. Wiesner and J. Thomas trans. 1969).

109. Rodes, *supra* note 103, at 25-29.

110. Shaffer, *Legal Views of Suicide*, in E. SHNEIDMAN (ed.), *SUICIDODOLOGY: CONTEMPORARY DEVELOPMENTS* 401 (1976).

111. W. PROSSER, *supra* note 84, at 184.

112. *Id.* at 172-173.

113. *Wagner v. International R. Co.*, 232 N.Y. 176, 133 N.E. 437 (1921).

114. W. PROSSER, *supra* note 84, at 186-87.

115. Compare Kirschenbaum, *The Bystander's Duty to Rescue in Jewish Law*, 8 J. RELIGIOUS ETHICS 204 (1980).

serious crimes. In such cases slaves were tried in the civil courts; Alabama provided defense counsel, at public expense, in such cases, from the earliest days of its existence as a state.¹¹⁶ But for most other purposes the slave was a chattel, not a human being. One way to read this curiosity is that the legal tradition required it; if one could commit murder or arson, he was entitled, as a matter of deductive reasoning, to the processes developed in the common law of England for the treatment of murderers and arsonists.¹¹⁷ (European law had even provided trials for animals, although that custom was apparently not preserved in Alabama.¹¹⁸) Another way to read the curiosity is that in some extreme situations it was impossible not to notice that the offending slave was a person, the noblest work of God. It was not so much a matter of having the culture's bluff called as it was of the happy fact that you cannot fool yourself forever.

A wrenching literary example of this insistence on the importance of truth is Robert Penn Warren's poem-story, "Brother to Dragons," which tells of the murder of a slave in Kentucky, by two of Thomas Jefferson's nephews. What Warren did there was tell us that we have to come to terms with the evil in ourselves by telling the truth about it, telling the truth to ourselves and in our communities:¹¹⁹

We have yearned in the heart for some identification
 With the glory of the human effort, and have yearned
 For an adequate definition of that glory.
 To make that definition would be, in itself,
 Or the nature of glory. This is not paradox.
 It is not paradox, but the best hope.
 It is the best hope, because we have,
 Each, experienced what it is to be men.
 We have lain on the bed and devised evil in the heart.
 We have stood in sunlight and named the bad thing good
 and the good thing bad.
 We have stumbled into the act of virtue and caught only
 from the tail of the eye
 The flicker of joy, like a wing-flash in thicket.
 But we must argue the necessity of virtue:

116. Hamilton, *The Origin of Alabama Laws*, 9 ALA. LAW. 346, 347-48 (1948); the fee of the slave-defendant's lawyer was paid by the slave's owner.

117. I have this analysis from Prof. Calvin Woodard of the University of Virginia.

118. Train, *The Dog Andrew*, *The Saturday Evening Post*, Nov. 15, 1919, at 20, 21, 185.

119. R. WARREN, *BROTHER TO DRAGONS* 213-15 (1953).

In so far as man has the simplest vanity of self,
There is no escape from the movement toward fulfillment.
And since all kind but fulfills its own kind,
Fulfillment is only in the degree of recognition
Of the common lot of our kind. And that is the death of
vanity.

And that is the beginning of virtue.
The recognition of complicity is the beginning of innocence.
The recognition of necessity is the beginning of freedom.
The recognition of the direction of fulfillment is the death
of the self,
And the death of the self is the beginning of selfhood.
All else is surrogate of hope and destitution of spirit.

The Bible is full of stories about the death of vanity as the beginning of virtue. My favorite is the story of Jesus and the woman taken in adultery (John 8: 1-11); it is, as you may recall, a story about a bad woman and the moral indignation of law professors. Or, perhaps, it would be better to overlook the moral indignation and say that the professors were trying to implement the law, in opposition to Jesus who was, as they saw it, a denigrator of the law. This story can be read as a one-kingdom story and as a story in which Jesus is a lawyer; Jesus was able to express the Law of Love *without* denigrating the law as the professors had it. (The persons who threw the first stone had to be the witnesses to the woman's crime; their turning away left the case unproved; *see* Acts 8:58 for a case, St. Stephen's, in which the accusers were not reluctant to throw the first stones.) In this case, as in the case of the Roman coin, Jesus put the law and love together, without either overriding the other.

These stories illustrate that the one-kingdom view of professional and public morality depends less on a theory or a doctrine than on a perception, an intuition, maybe on what Jacques Maritain called "con-natural¹²⁰"—the human experience in which I look out for myself—as the workmen's compensation hearing officer does; as the jury in the case of *Stone v. Satan* did; as the Pharisees did when Jesus told them that the one without sin should cast the first stone at the adulterous woman; as the immigration officer in San Francisco should have—and see that this other is a creature like myself. This is not a point of view that rests only on principles, and I tend to believe that it is corrupted when it is limited to principles—as it was in Blackstone and, in a different way, by "natural law" moralists in the Roman

120. J. MARITAIN, MAN AND THE STATE 89-94 (1951).

Catholic tradition. But, even if it is not a matter of principles, I think we can make a few observations about it:

First: There is such a thing as essential humanness—such a thing as human nature.¹²¹

Second: A person lives virtuously when he lives, within himself *and* in his community, according to this nature. That is as true of a lawyer in town as it is of a lawyer when he is at home. It is as true of law as it is of morals.¹²²

Third: This law of nature is ordained by God, Who made us as we are, and Who is a God of love. There is no legitimate tension between love and justice. Justice is a way to express love. It is a gift we give to one another, as we try to live together.¹²³

Fourth: We learn about this “natural law” in a number of ways, most of them ordinary and some of them unavoidable:

- from our culture, our traditions, our shame, and our history; for example, from the common law, the Declaration of Independence, and, even more, from the centuries of thought that produced them; from *reflecting* on these things and teaching them, as Thomas More put it, “in the tangle of [the] mind.”
- from an intuitive, inarticulate perception of the fact that the other is a similar sort of creature. Martin Buber, the Jewish theologian, put it this way:¹²⁴ “I can recognize in him, know in him, more or less, the person he has been (I can say it only in this world) *created* to become. . . . Surrounded by the air of a chaos which came into being with him, secretly and bashfully he watches for a Yes which allows him to be and which can only come to him from one human person to another.”
- and finally from a process of reasoning which draws out implications, for law and for morals, from our common humanity.

These ways to learn *are* intuitive, I think, and that is why we find them in their most understandable form in stories¹²⁵ and in cases (which

121. Barrett, *A Lawyer Looks at Natural Law Jurisprudence*, 23 AM. J. JURISPRUDENCE 1 (1978).

122. O'Meara, *Natural Law and Everyday Law*, 5 NAT'L L. R. 83 (1960).

123. Shaffer, *supra* note 19, at 136-41.

124. M. BUBER, *I AND THOU* 182 (W. Kaufmann trans. 1970).

125. Shaffer, *supra* note 19, at 165-76; *supra* note 15.

are the stories we common-law lawyers read and learn and teach from). Formally, this seems to be an inductive process, a process of analogies. It is at the heart of the way an American lawyer defines the law to himself—not as a matter of rules but as a way of coping with power “in the tangle of his mind.” In this way it is possible for a lawyer, whose client asks, “What is the law?” to answer: “It depends on what we want it to be”—and to do this without either guile or cynicism.¹²⁶

I am conscious here of the fact that I may have set up a straw man. Is the Lutheran doctrine of the two kingdoms really inconsistent with what I have called the one-kingdom view? Perhaps not. In any case one should notice that Luther taught that the Christian must exercise worldly power with motives formed in the kingdom of love. Luther spoke of the Christian prince as a *minister*; and, certainly, it is possible to think of a modern American lawyer's or judge's life as a life of ministry—that, really, more than a life of advocacy or of administration.¹²⁷ (The average American lawyer spends about four-fifths of his time talking to people in his law office, often without any formal outcome and usually without a consequent lawsuit or public controversy.) If life is a matter of being sometimes shepherd and sometimes hangman, most of a lawyer's professional life involves being a shepherd—or, at least, I think, Martin Luther would say that most of a lawyer's life should be the life of a shepherd; that is a lawyer's office, most of the time. The President Emeritus of this University, Dr. Albert G. Huegli, said that well when he dedicated your law school to “future lawyers who live out their lives in the shadow of and commitment to the Cross.”¹²⁸ And even where the lawyer is a hangman, his disposition should be a disposition formed in the shadow of the Cross. “He is a poor Christian indeed who for the sake of a single castle would make an armed camp of the whole land,” Luther said.¹²⁹ The prince—and, I think, the modern lawyer or judge—“must not regard his own injury,” or his client's, “but the wrong which others must suffer as a consequence of the penalty he imposes. For what have the many women and children done that they should be made widows and orphans in order that you may avenge yourself on an idle tongue or a wicked hand which has injured you?”

126. O'Meara, *An Introduction to Law and How to Study It*, 48 NOTRE DAME LAW, Supplement (1973).

127. *Supra* note 30, at 392-402. Reconciliation of disputes is a possibility, often, in this ministry, and reconciliation with a biblical basis illustrates what Luther had in mind. See L. BUZZARD and L. ECK, *TELL IT TO THE CHURCH* (1982).

128. Bartelt, *supra* note 1, at 21.

Conclusion

Fairness may require that I distinguish between the teaching of Martin Luther on obedience to civil authority and what has come, by many, to be called "the syndrome of the two kingdoms." It is important to notice that there is a recurrent tendency in moral thought, a tendency that serves the deceptive way in which we excuse the evil we do, to find a special morality to govern each part of our ambiguous selves.¹³⁰ It is hard to live as a whole person. It is important to see that, I think, and to tell the truth about it. What I have identified as the one-kingdom view seems to me a sound intellectual discipline for telling the truth, for being responsible. It may not be important, as it may not be fair, to blame the error on those who have taught the theology of the two kingdoms. In any case, it is important to say of both theologies that they teach about a single person, a single person who is under the judgment of God and who has been redeemed. That single person behaves in two prototypical ways—in institutions and out of them. He serves institutions much of his time, and some of the time he does not serve institutions. The debate is about how he should behave when he behaves institutionally. Traditional two-kingdoms reasoning would come much of the way with me in making some melancholy reflections about the way we lawyers behave when we behave institutionally—in government and in courts, in law firms, in churches, universities, and Rotary Clubs:

(1) We tend in institutions to suppress our best discoveries about human nature. People in institutions tend to take all human insight, all principles, and turn them into ways of insuring the institution's survival. Our life in institutions seems to be a life in which the noblest work of God is always, finally, made subject to the noblest work of man. I think this fact explains the achetypal need we seem to have for a theology of two kingdoms. It is what makes the two kingdoms not so much a theology as a syndrome. One way to say what I want to say is to say that institutions are not redeemed—never, not any of them.¹³¹

(2) When we act in institution—and this is the reason it seems good to act in institutions—we act in favor of stability and order. That was true of the government Martin Luther told to suppress revolt, and it is true of a twentieth century government that, for ex-

129. *Supra* note 30, at 397-98.

130. *Supra* note 45.

131. Shaffer, *supra* note 19, at 8-9.

ample, impounded an entire ethnic group among its citizens because members of that group reminded it of its enemies.¹³² Institutions tend to turn the noblest work of God into a fungible commodity and then to invent noble reasons for having done so. One thinks of the fact that the ethics of the gentleman—in, say, the case of Atticus Finch—depended on the belief that most people have to be protected (and that tends to become only a nice way of saying that most people are inferior); as Atticus' contemporary, Gavin Stevens, a Mississippi lawyer, said, one begins protecting the weak, and he comes to the place where he protects the weak who aren't even weak¹³³—women, black people, and the Boo Radleys among us, whom we call feeble minded. It isn't conscious evil and shoddy excuse you have to cope with when you study our professional history; it is the self deception of noble motives.¹³⁴

(3) People in institutions have a way of acting, an official, legal tendency to turn other people into commodities, and to excuse themselves with grand, official phrases such as equality, due process, and the rule of law. But behind the phrases are hidden patterns of behavior which demonstrate, when brought into the light, that people in institutions do not have values strong enough for community life. The institution is substantively empty. All it has is procedures. Two-kingdoms theory provides substantive values through the doctrine of love's influence on law. "Natural-law" and Barthian theology provide substantive values through denial of the distinction between law and morals. Without substantive morals, people in legal institutions tend to forget, as both Luther and the Scholastics would have said, that law is an ordinance of reason for the common good. One way to put this would be to say that our institutions benefit from the syndrome of the two kingdoms because, that way, there is always at least one kingdom for our institutions to control. Another way to put it would be to say that the theologians in our Christian tradition who have taught of the two kingdoms have been misused. They never supposed that the kingdoms were as separate as twentieth century perversion has made them. Luther closed his essay on obedience to law with an appeal to the justice that is written in our hearts, to love, and to the law of nature.¹³⁵ He urged the prince to whom he sent the essay, the Duke of Saxony, to take account of these springs of justice, "and

132. *Korematsu v. United States*, 323 U.S. 214 (1944).

133. W. FAULKNER, *THE TOWN* 88-96 (1961).

134. Shaffer, *Henry Knox and the Moral Theology of Law Firms*, 38 WASH. & LEE L. REV. 347 (1981).

135. *Supra* note 30, at 402.

not make the spring dependent on its rivulets, nor take reason captive to the letter."¹³⁶

136. I am grateful for the comments and suggestions of Stanley Hauerwas, Louis W. Hodges, Lewis H. LaRue, and Robert E. Rodes, Jr. I am grateful, too, for the opportunity, provided by Mr. Seegers and Valparaiso University, for me to learn from Martin Luther. Luther was himself—and I trust this can be said without irreverence—a Mighty Fortress. He was a mighty scholar, too; I leave this project with particular affection for him and for his sometimes humorous encouragement for other scholars: "It is true," he said, "it would be difficult for me to ride in armour. All the same, I would like to see the horseman that could sit still all day looking at a book." *Supra* note 30, at 43.

